IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 310

JOSEPH CARROLL ET AL., *Petitioners,*

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ET AL., *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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INTRODUCTION

Plaintiffs seek review of the judgment below which, with one significant exception, affirmed the dismissal of their complaint by the District Court.[1] Their Peti-

[1] The exception is the holding of the Court of Appeals that defendant unions violated the anti-trust law by establishing the minimum "price" which the purchaser of music must pay on club-date musical engagements, which is the subject of defendants' Petition, No. 309, of this term. That Petition, and the opinions of both lower courts reprinted therein, will be cited as (Pet. #309, p. —). Plaintiffs' Petition in No. 310 will be cited by page number (p. —).

tion for Certiorari raises twenty-seven Questions Presented. Throughout the Petition factual assertions are made which are unsupported by the meticulous findings of the District Court, which were left undisturbed by the Court of Appeals; many of those assertions are incomplete, misleading, or actually contrary to the findings.[2] Under the rubric "Additional Union Practices" (pp. 11-18) plaintiffs deal at length and seemingly at random with various matters which they deem objectionable; many of these have not previously been involved in this suit, or are entirely irrele-

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[2] It would be neither feasible nor useful to the Court to expose all these misstatements, but one example, dealing with an issue fully litigated at trial, should be sufficient to measure the reliability of plaintiffs' assertions.

Plaintiffs flatly state (p. 15) that recording and television companies are not the employers of the musicians. But the District Court expressly found that plaintiff Cutler, as an orchestra leader, was an employee in both fields. (Pet. # 309, p. 70a.)

Again calling the leader the "employer" on recording engagements, plaintiffs say that "he is saddled with the expense of employer payroll taxes and contributions. (p. 16). But the District Court found, "The recording company withholds and pays over to the appropriate governmental agencies federal and state withholding taxes and social security taxes for all musicians, including the orchestra leader." (Finding 67, Pet. #309, p. 42a).

Subsequently, plaintiffs say "During recording sessions, orchestra-leader-employers are in control (3857; 1078-1080; 1198-1203) but Unions exaggerate the control of the A&R man for their own purpose." (p. 17). But the District Court found that an "employee of the recording company known as the 'artist and repertoire representative' (the 'A&R man') has the ultimate responsibility for the musical product embodied in the phonograph recording." (Finding 63, Pet. #309, p. 41a). The District Court described the control exercised by the "A&R man" in detail. (Findings 63-65, Pet. #309, pp. 41a-42a). These findings were based on uncontradicted evidence, cited therein, which consisted mainly of the testimony of an "A&R man" called as a witness by plaintiffs, and the head of the "A&R department at Columbia Records.

vant to any antitrust issue decided below.[3] See also Par. 8, pp. 23-24, listing sixteen alleged forms of defendants' "unmitigated commercial restraints and tyranny". These sweeping allegations, and plaintiffs' unbridled use of invective and emotionally charged language hardly promote consideration of the issues which were decided against plaintiffs below and which alone are properly the subject of their present Petition. Under the heading, "Reasons for Granting the Writ", petitioners set forth seventeen separately numbered paragraphs which have no readily discernible relation to the twenty-seven Questions Presented, and which only fleetingly attempt to show that the Questions Presented meet the standards for this Court's exercise of its *certiorari* jurisdiction as stated in Rule 19. Consequently plaintiffs' Petition comes squarely within Rule 23(4), which provides as follows:

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

Its formal deficiencies are sufficient reason for denial of plaintiffs' Petition. However, we shall briefly discuss the merits in order that the Court may satisfy itself that review of the judgment below, insofar as it rejects plaintiffs' claims, is not warranted.

Analysis of this case is fortunately simplified by the careful and elaborate findings, copiously annotated to

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[3] Again we shall limit ourselves to one example. Plaintiffs assert it to be unlawful *under New York State law* for orchestra leaders to be union officers (p. 15, n. 11). There is no allegation in the complaint on this issue.

the record, which were made by the District Court. As these findings were not disturbed by the Court of Appeals they come within the settled rule that this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635. No "very obvious and exceptional showing or error" is or can be made by plaintiffs with regard to these findings. The issues which were decided against plaintiffs below, and which are subject to review on their petition are enumerated by the Court of Appeals in its Opinion. Pet. No. 309, pp. 10a-11a. Before discussing these issues individually, we shall examine three critical assumptions which are made throughout plaintiffs' petition:

1) Plaintiffs continuously claim that orchestra leaders are "employers" regardless of the nature of the musical engagement. However, the courts below determined leaders to be employers only on club-date engagements and expressly found them to be employees on recording and television engagements. See n. 2, *supra*. While such determinations raise mixed questions of law and fact and are thus not subject to the two-court rule, plaintiffs' Questions Presented do not challenge them.

2) Plaintiffs assume in fourteen of their Questions Presented and six of the separately numbered paragraphs of their "Reasons" that orchestra leaders are members of a "non-labor group". Under this Court's decisions, discussed at Pet. No. 309, pp. 9-11, combination with a non-labor group is the *sine qua non* of antitrust liability for labor unions. Accordingly "labor group" is a concept with significant legal consequences,

and the conclusion of both courts below (*id.* pp. 23a, 71a-72a) that leaders are members of a labor group is not binding here. But the conclusion below is eminently correct. It is firmly grounded in the District Court's factual findings. (*id.* pp. 34a-36a, discussed *id.* at pp. 4-5). Plaintiffs assert that the definition of the antitrust exemption for labor groups in *Meat Drivers* v. *United States,* 371 U.S. 94, 103 is mere *dictum.* But clearly, it is a carefully considered limitation of the Court's decision affirming the injunction which the District Court had entered against membership of certain individuals, the grease peddlers, in the Meat Drivers union. The evident purpose of this passage was to preserve the authority of *Milk Wagon Drivers Union* v. *Valley Farm Products,* 311 U.S. 91 and later cases which uphold the right of unions to regulate the earnings of those who are in job and wage competition with their members. While plaintiffs complain that the definition of "labor group" in the *Meat Drivers* decision is "vague" (Pet., p. 30), we think that it correctly defines the considerations relevant in identifying whom unions are privileged to regulate under the labor exemption to the antitrust laws. Moreover, since there is demonstrated job and wage competition between leaders and employee members, there is no occasion in this case for this Court to consider the scope of other forms of "economic interrelationship" which would qualify persons as members of a labor group.[4]

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[4] The District Court held, correctly we think, that a sufficient economic interrelationship was demonstrated between musicians and booking agents and caterers in order to justify including them in a labor group. Pet. No. 309, pp. 77a-79a. The issue need not be reached because the Court of Appeals held that plaintiffs did not have standing to challenge the unions' regulations of these groups.

3) Because the existence of job and wage competition between leaders and other musicians is the heart of the case, it is the object of plaintiffs' strongest verbal barrage (Pet. pp. 26-30), including a flat statement that such competition is "unproved in the record but merely alleged there, in general, conclusory language by Union officers" (p. 26). However, the existence of such job and wage competition was not only abundantly established on the record but is the subject of careful findings by the District Court. These were not disturbed on appeal (Pet. No. 309, pp. 34a-36a), and are protected by the Two-Court Rule. Given these findings regarding the realities, we think no purpose would be served by minute analysis of plaintiffs' labyrinthine theorizing as to why such competition is impossible.

Once plaintiffs' basic assumptions have been examined and rejected, their individual claims are readily disposed of. (We discuss them in the order they were listed by the Court of Appeals.)

Union regulations fixing the minimum number of employees to perform particular work have been held exempt from the antitrust laws. *United States* v. *Carrozzo,* 313 U.S. 539; *United States* v. *American Federation of Musicians,* 318 U.S. 741. Plaintiffs neither mention these decisions nor show any reason why their authority should be disapproved.

The unions' territorial restrictions on the operations of leaders and sidemen were found below to promote local work opportunities of employee members. Plaintiffs do not appear to challenge this factual finding, *cf. Meat Cutters* v. *Jewel Tea,* 381 U.S. 676. Immunity of such demands from the antitrust laws has long been settled as is shown by the decisions cited by the courts below. (Pet. No. 309, pp. 20a-21a, 79a-80a.) These

travel restrictions are enforced through union by-laws and without combination with any non-labor group.[5]

Plaintiffs' claim that defendants monopolize the music industry, that is that they enforce closed shops, was correctly disposed of below on the authority of *United States* v. *American Federation of Musicians, supra.*

The courts below correctly held that a refusal to bargain by a union does not constitute a violation of the antitrust laws. *Hunt* v. *Crumboch,* 325 U.S. 821. Plaintiffs assert that the *Hunt* case should be overruled or modified because of the enactment of the Taft-Hartley Act which forbids the closed shop and imposes on unions the obligation to bargain with employers upon demand in certain situations. However, in enacting Taft-Hartley Congress did not choose to expand union liability under the Antitrust laws. Rather it determined that the legality of the union activities which it banned should be regulated, and if necessary remedied, by the National Labor Relations Board. Even where union activities were subject to court action at the instance of injured parties the remedies of the antitrust laws were avoided. See *Teamsters Union* v. *Morton,* 377 U.S. 252, 260 note 16. Plaintiffs assert, "Collective bargaining was designed to balance union acquisitiveness and self-interest to protect not only the employer but more importantly the public." (p. 32). But see *American Steel Foundries* v. *Tri-City Trades Council,* 257 U.S. 184, 209 and § 1 of the National Labor Relations Act, 29 U.S.C. § 151.

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[5] The Court of Appeals relied additionally on its view that such restrictions constitute mandatory subjects of bargaining. While we agree with this view, we submit that the availability of the labor exemption does not depend thereon. See Pet. No. 309, pp. 12-14.

The court below correctly held that the unions efforts to compel orchestra leaders to become members do not violate Antitrust laws. There is no reason now to upset the settled course of decision on this issue from *Lake Valley, supra,* through *Meat Drivers, supra.*

The determination by the Court of Appeals that plaintiffs showed no injury authorizing them to challenge the defendants' regulations regarding booking agents and caterers is obviously factual and raises no issue warranting review. Nor does its refusal to decide whether plaintiffs' suit qualifies as a "spurious class action" qualify for review. The Court's conclusion that the suit is not a "true class action" is eminently sound in light of the findings of conflict within the class which plaintiffs claim to represent. The limitations on true class actions, based on elemental concepts of due process, cannot be overcome by bald claims (pp. 35-36) that a "class" or "group" exists.

CONCLUSION

By reason of the foregoing, plaintiffs' Petition for Certiorari should be denied.

Respectfully submitted,

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